INFORMATION

FOR

RICCARDTON DRUMMOND

Against

The Creditors of Sir William Ni-colson of that Ilk.

pal, with the deceast Sir William Nicolson in two Bonds, one of 6000 merks principal, to the deceast Mr. Edward Wright; And an other of 4000 merks principal, to the deceast Sir John Young of Lenie, without any Clause or Bond of Relief. albeit the Money was wholly converted to Sir William's use, and that in effect Riccardton was only bound as Surety and Cautioner for him, tho the saids Creditors choosed rather to have him bound in the Bonds as Coprincipal: Riccardton, in Sir William's own time, intented an Action of Declarator, that the Terms of his foresaid Engagement might be declared, and Sir William decerned to relieve or secure him for his Relief, as being upon the matter, a meer Cautioner for him.

This Declarator not having taken effect in Sir William's life, and the Estate of Nicolon being now sold by Roup, and the Price lying consigned, until some Questions amongst the Creditors be discust. One of these Questions is anent Riccardton's foresaid Declarator, who craves to be received in the Competition as a Creditor, in manner foresaid, and Riccardton having by the Lords deliverance upon a Bill, obtained in February 1687, certain Witnesses to be examined upon the foresaid Points of his Declarator, that their Depositions might ly in retentis, until the advising of the Cause, and the said Depositions being taken, and now craved to be advised, after the reading of these Depositions in præsentia, which clearly prove. That albeit Riccardton was insert as Co-principal in the Bonds foresaid, yet he was only a Cautioner for Sir William, and that the Money was ap-

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plyed to Sir William's proper use, and that Sir William caused draw a Bond of Relies to Riccardton thereanent, which was only not accepted of by

Riccardton, for the Reason contained in the Depositions.

It was Objected by the Creditors. I. That Riccardton his being Coprincipal in the Bonds, without any Clause or Bond of Relief, did naturally infer, That he had received the half of the Money, or at least that the halt thereof was borrowed for his behoof, which being established by Writing, could not be taken away to the prejudice of Sir William and his Creditors, except scripto vel juramento partis, but not at all by Witnesles. To which it is answered for Riccardton. That albeit Persons, binding as Coprincipals. in manner foresaid, may of it self import, that the Money was borrowed equally for their behoof, Yet, this Presumption is of very little weight or moment, In regard, that it is very well known, that the general custom of such Bonds, doth run quite contrare, it being most certain, that tho several Persons may be bound in one Bond, as Co-principals, yet it is still prefumed, that the Money is borrowed for the behoove of one of them in particular, & hat the Bond is only taken from them all as Co principals; Because such was the Creditors choise, who commonly judge the Obligation to be stronger upon all, when they are bound as Co principals, then when one is only bound asprincipal, and the rest as Cautioners; And this is to certain, first, That it can hardly be instanced, that ever upon the binding of Co principals the Money was truely to the behoof of all. except in the case only where they were previous partners, and known to be such, which neither is nor can be alledged in this case, betwixt Riccardton & the said Sir William. And 2. That we fee daily, that Creditors ad majorem cautelam will have such who interpose only as Cautioners to bind as Co.principals, and very often do refuse to allow any clause of Relief to be insert in the Bond, but leave it to the Obligants to order this by a Bond of Relief apart, so that in effect, whereever a Bond appears to be granted by Two or more as Co principals, the prefumption more naturally rifes, that one of them is only principal and the rest sureties, then that the Money was borrowed to all their behooves, unless this prefumption be taken off by alledging, and proving, that these Co principals were previous partners in a common Society, which cannot be alledged in this case.

Nor can it be Replyed for the Creditors, That if in the case of more Co! principals there be ordinarly a clause or Bond of Relief, then in this case where there is neither, the presumption must return upon Riccardton, because it is evident that the Creditors having refused to suffer clauses of Relief to be insert in the Bonds, it was only Sir William's fault, that Bonds of Relief a part were were not granted, and the pursuit raised by Ruccardson against Sir William in his own time for this Kelief, and the Treaty proven to have been about it, do prove this point above Exception, seing therefore that it is no ways established by written Bonds, that the Money borrowed was to the equal behoof of the Co.principals, but that the prefumption tuns far stronger that it was not, it is without controversie, that this point in question is nor to take away Write by Witnesses, but only to clear the import of the Writing by Witnesses, which are certainly thereto most proper and probative: So that Sir William's Credi: tors cannot in reason alledge, that Riccardton, doth in this case offer to take away Write by Witnesses, since all contended for, is to clear a point which remains doubtful by the Write. and prefumes much itronger tor Riccardton

by Witnesses above exception which all Law allows.

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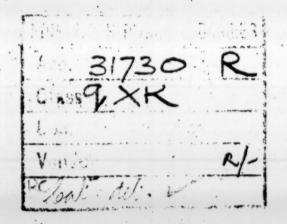
But 2. It was alleadged for the Creditos, That as it was against Law to allow Witnesses to take away Write, so the Depositions were not all of Instrumentary Witnesses, but most of the Witnesses were extraneous. To which it is answered, That scarce in any case, can more proper Witnesses be adduced, nor in the case in hand, they being partly the Writer and Witnesses of the Bonds, and partly Lawyers and Agents concerned for both Parties in the Treaty that was betwixt Sir William himself and Riccardton, for this Relief. And 2. The Depositions are so Circumstantiat, and strongly Adminiculat, both by the Copie of the Bond of Relief, that was drawn, and almost concluded, and which deserted only upon a groundless Scruple on Sir William's part, and likeways by the process raised by Riccardton, in Sir William's life, that there cannot be a clearer Evidence defired in any matter of this kind.

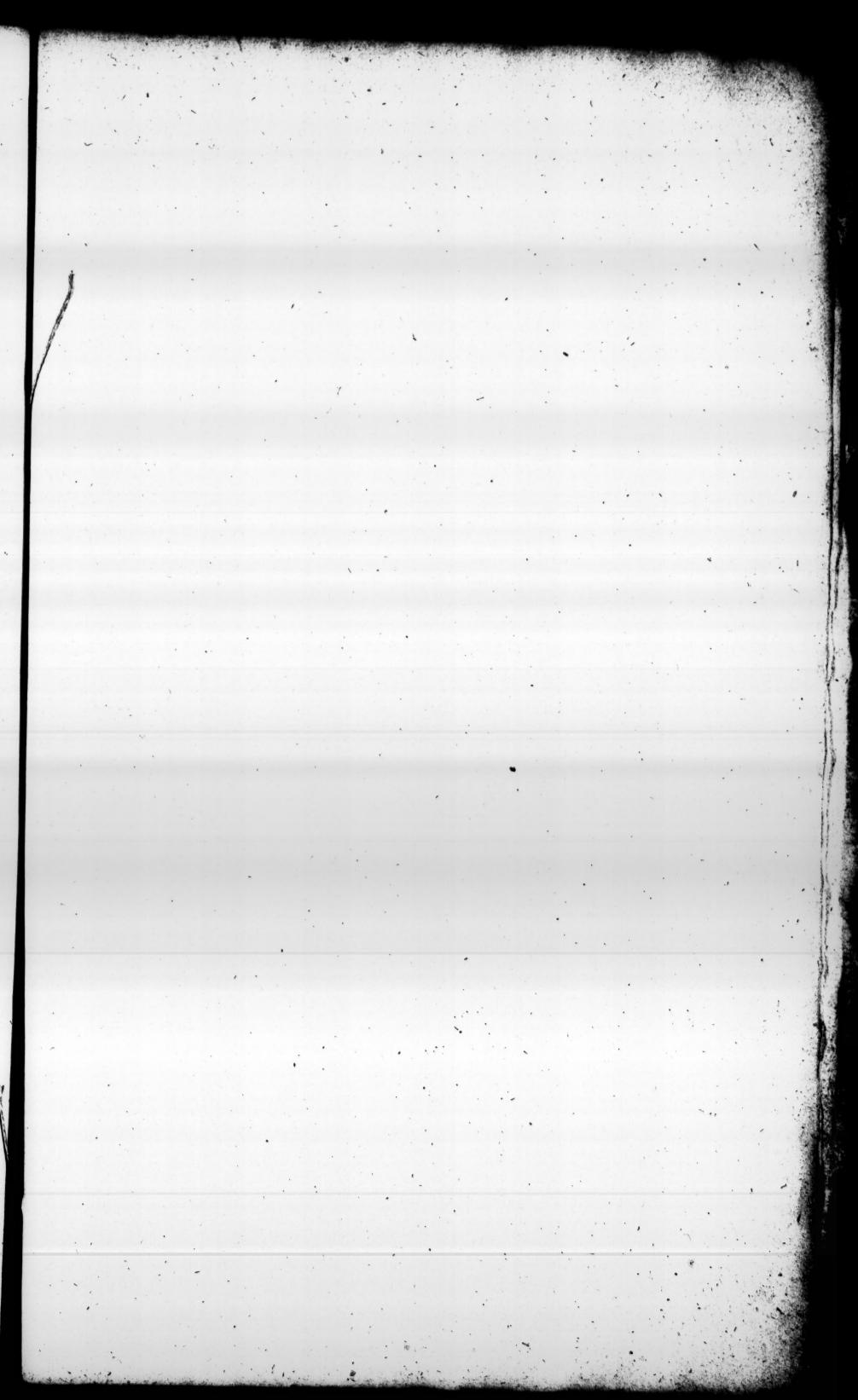
And whereas it was alledged for the Creditors, that Witnesses could in Law, neither be allowed to prove contrare to Writ, Nor 2 To prove verbal Promises, or naked Emission of Words. It is Answered, That albeit in Law direct payment of a Debt constitute by Write, cannot be proven be Witnesses, yet it alse uncontrovertible, that payment of a Debt may be proven consequentially by positive probation of a Deed which does presume the same, and which Deed is probable, either be pregnant presumptions, or Witnesses beyond exception; As for instance, Tho payment of an Bond cannot be proven by Witnesses, yet a positive Fact may be proven which will necessary inter the same; As if it should be proven, that the Bond was revited Sapad debitorem, it would evacuat the same alse well as an Discharge

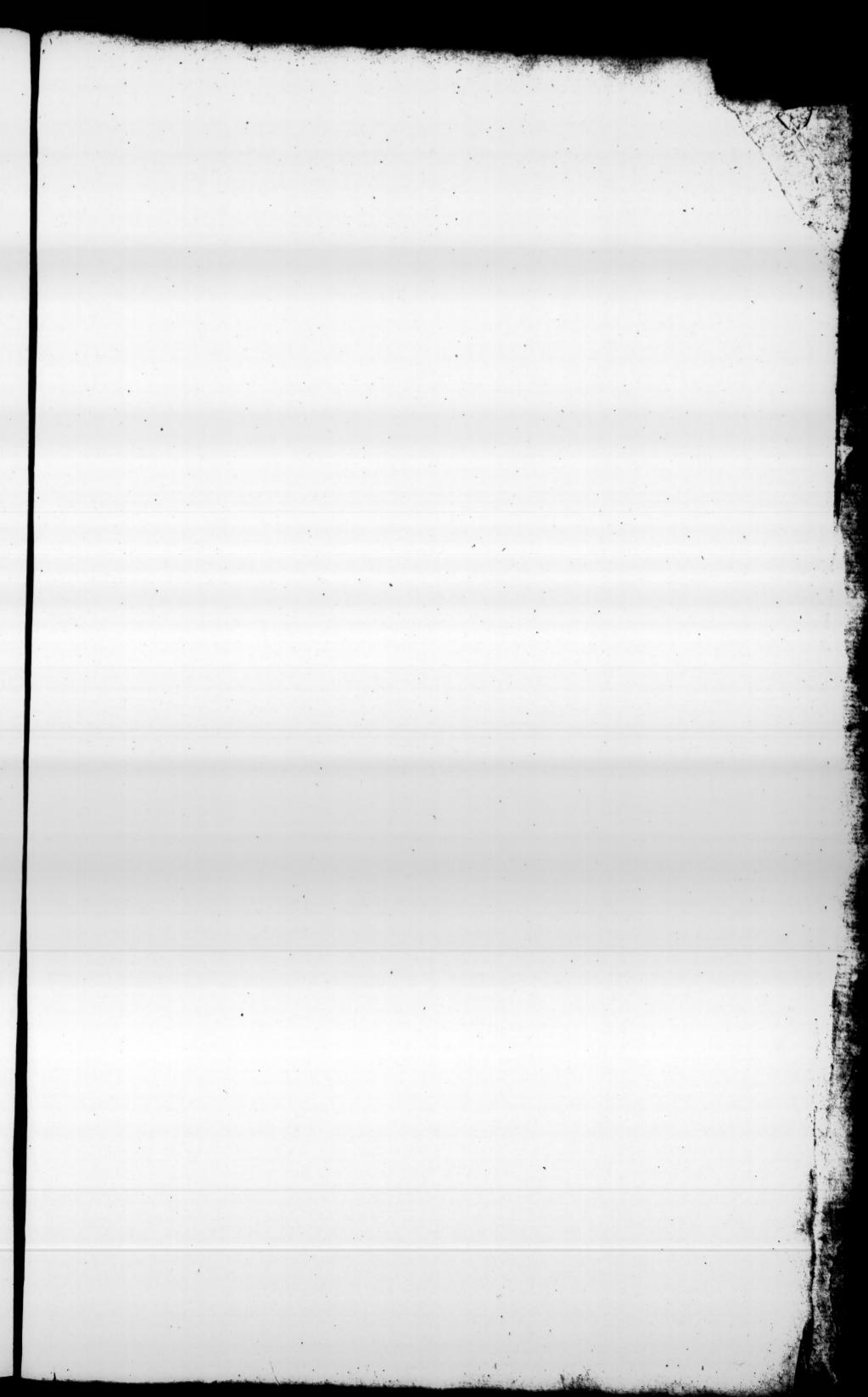
bearing payment.

To the Second, It is Answered, That Witnesses are not in this case adducted for taking away a Write directly, but only for clearing the Import thereof as said is, which is both consonant to Law and Custom, and this is not the case of proving naked words by Witnesses, because here there is Write and a Tract of Business, viz. the Borrowing of Money, and the communing betwixt the parties anent the relief, and their Advocats and Writers, anent the drawing of an Bond of Relief as said is, so that there is not only an Tract of Assairs, but alse rei interventus, and it is unquestionable in Law, but that Words or Communings accossary to Bargaines or Treaties, are probable be Witnesses, so tar more in this case, when the Witnesses are Gentlmen of Knowledge, Advocats and Writers, all beyond exception as said is.

In Respect whereof, The Probation ought to be sustained by Witnesses, whereby it is sufficiently proven that Riccardton was only Cautioner in the saids Two Bonds, and that the Money was applyed solely for Nicolson's behoof.







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